

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Vonage Holdings Corporation)	
Petition for Declaratory Ruling)	WC Docket No. 03-211
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

November 24, 2003

**REPLY COMMENTS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION
REGARDING THE PETITION OF VONAGE HOLDINGS CORPORATION FOR
DECLARATORY RULING CONCERNING AN ORDER OF THE MINNESOTA
PUBLIC UTILITIES COMMISSION**

LeRoy Koppendraye, Chair
R. Marshall Johnson, Commissioner
Ken Nickolai, Commissioner
Phyllis Reha, Commissioner
Gregory Scott, Commissioner

Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147
(651) 296-7124

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Introduction

The Minnesota Public Utilities Commission (MPUC) respectfully submits its comments in reply to comments filed with the Commission on October 23, 2003 regarding the September 22, 2003 Petition for Declaratory Ruling ¹ filed by Vonage Holdings Corporation (Vonage).

In general, two observations can be made from the October 23 comments:

1. Voice over Internet Protocol (VoIP) is a technology that has many current applications and potentially many more future applications. Some of these applications may be properly regarded as information services, but
2. Vonage offers a telecommunications service using VoIP technology.

The MPUC recommends that the Commission 1) dismiss the Vonage petition, and 2) move swiftly in its newly announced rulemaking ² to fashion a clear and reasonable framework for determining which other VoIP applications are telecommunications services, and which are information services.

The urgency of Commission action cannot be overemphasized. Since the MPUC's initial comments, Qwest Communications International has announced it plans to initiate a VoIP telecommunications service in Minnesota, beginning in December. ³ According to this article, Qwest chief executive Richard Notebaert said Qwest will take advantage of U.S. District Court Judge Michael Davis' decision that Minnesota can't treat VoIP providers like regular phone companies or collect regulatory fees. "The Minnesota ruling allows...VoIP providers to circumvent regulations," he said. "So Qwest is paying attention and learning and is becoming

¹*Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211.

²*FCC to Begin Internet Telephony Proceedings: VoIP Forum Scheduled for December 1* — FCC News Release dated November 6, 2003.

³See *Qwest to launch VoIP in December* by Ben Charny, CNET News.com, November 19, 2003.

one of them, beginning in Minnesota.”

VoIP Technology and Applications

It is important to distinguish between a technology and the applications of the technology. VoIP is a technology that permits voice data to be transmitted over IP networks. Neither the Commission nor the MPUC are in the business of regulating technology. It is only when the technology is applied in a particular way to provide a service that regulatory interests may be invoked.

Thus it is incorrect to say, as did the Voice on the Net Coalition, that “The Commission’s long-standing policy that VoIP is an unregulated information service ...”⁴ The confusion of technology and application is evident in several comments,⁵ particularly where the commentors support Vonage’s petition. No doubt this serves their purpose because if VoIP is perceived as a service or application itself, instead of a technology, then it becomes indivisible, and all applications using VoIP technology must be regulated alike. If it can be shown that one such application is more an “information service” than a “telecommunications” service, no regulation can be applied to any service employing VoIP technology.

The MPUC is confident the Commission understands the fallacy of this argument in which the characteristics of one service are transferred to the underlying technology, and then attributed to all services using the technology. The misperception is pervasive, and because it serves the ends of some of the participants, it is difficult to correct. This is why the Commission’s

⁴*Comments of the Voice on the Net Coalition*, p. i.

⁵For example, *Comments of Paetec Communications, Inc.*, *Comments of USA DataNet Corporation*, and *Joint Comments of MCI and CompTel* just to name three, show no distinction between VoIP and a service that utilizes VoIP.

investigation and rulemaking involving VoIP needs to be done both carefully and quickly. We all need the guidelines that will enable us to distinguish and deal with the functions of the offerings, not the underlying technology, or whether the Internet is used as a transport medium.

Vonage offers a Telecommunications Service

While the MPUC recognizes it either now is or soon will be possible to design and market a service using VoIP that may be an “information service,” it is clear that right now Vonage is offering a “telecommunications service” because it is engaged in the “...offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

Vonage’s offering is a real-time voice transmission service. Customers use ordinary touch-tone phones to initiate and receive calls. The service does not involve generating, storing, retrieving, or otherwise processing information, the hallmarks of an “information service.”

Vonage and its supporters rely on a four-point test of the Commission to claim that Vonage’s IP telephony is not a telecommunications service.⁶ Their reliance is misplaced, for several reasons.

First, the four-point test is not an order or other determination of the Commission. Rather, it was a tentative formulation of a possible way of determining whether a service was a telecommunications service. It has no force of law.

Second, while the Commission said that services meeting the test would (probably) “lack the

⁶*In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998) (Universal Service Report). The four points are: 1) the provider holds itself out as providing voice telephony service; 2) the service allows use of Customer Premises Equipment (CPE) similar to that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; 3) the service allows customers to call telephone numbers assigned in accordance with the North American Numbering Plan (NANP); and 4) the service transmits customer information without net change in form or content.

characteristics that would render them information services within the meaning of the statute,”⁷ it did not foreclose the possibility of other services also being so classified.

Third, as a number of persons have argued, Vonage’s service offering in fact satisfies the four-point test. Vonage admits that it holds itself out as a telecommunications provider and that it allows calling in accordance with the NANP. While it argues its service involves a net change in form, the argument is specious: the message is exactly the same at both ends of the line. For “net change in form or content” to have any meaning, it must be measured from the customer’s perspective. And assuming that a narrower perspective could be reasonable, the comments of the Frontier and Citizens Telephone Companies point out that recognizing the CPE provided by Vonage assures there is no net protocol conversion within its purview.⁸ And while Vonage is correct in saying additional CPE is required, beyond the touch-tone phone, it cannot seriously be argued that a protocol converter changes a telecommunications service into an information service. This is especially true when the protocol converter is used to assure there is no **net** protocol conversion, end-to-end.

Finally, the Commission has received a number of comments from authorities concerned with the public health and safety through 911 programs.⁹ Aside from the very serious issues of public safety these comments raise, they provide rich evidence that the public views the service Vonage provides as a telecommunications service.

⁷Id. ¶89.

⁸*Comments of the Frontier and Citizens Telephone Companies*, p. 3.

⁹*Comments of the Association of Public-Safety Communications Officials International, Inc., Comments of the Metropolitan 911 Board, Comments of the Washington Enhanced 911 Program, Ex Parte Comments and Initial Comments of the Texas Commission on State Emergency Communications and Texas Emergency Communications Districts, and Comments of the Minnesota Statewide 911 Program.*

Recommendation

The MPUC recommends first that the Commission dismiss the Vonage petition. Vonage employs VoIP technology to provide a telecommunications service. There is no reason to preempt the legitimate exercise of state public safety and consumer protection regulation of this service that is the functional equivalent of telecommunications services using a different technology.¹⁰ This is especially important in light of Qwest's announced intention to deregulate itself by providing telecommunications services using VoIP technology.

The MPUC also recommends that the Commission proceed both swiftly and thoughtfully in its recently announced rulemaking to develop a framework for evaluating other services employing VoIP technology so that they may be appropriately classified within the regulatory scheme.

Conclusion

Vonage is clearly offering a telecommunications service. Its petition should be dismissed. The Commission must then move quickly and reasonably to adopt a framework under which new service offerings using VoIP may be classified for regulatory purposes.

Respectfully submitted,

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission

¹⁰The permanent injunction imposed by the Federal District Court for the State of Minnesota is still in full force and effect, although motions to amend findings and judgment have been filed and are pending before the Court.